

# CHAPTER SIX

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## MINORITIES AND JURY SERVICE

### THE GOAL: A JURY OF ONE'S PEERS

“[T]he opportunity for jury service shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state.”

—Oregon Revised Statutes  
§ 10.030(1) (1994).

# INTRODUCTION

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It is an axiom of popular culture to claim one has a right to be judged by a “jury of one’s peers.” That guarantee notwithstanding, the Task Force concluded that the efforts of Oregon’s judicial system to achieve inclusive juries was inadequate. The Task Force received testimony and survey responses that juries were not representative of the communities served. Further, the Multnomah Bar Association 1993 Jury Pool Report concluded that in Multnomah County white, college-educated and married people, home owners and those aged 35 to 74 were overrepresented in jury pools. The Task Force determined that procedural mechanisms used to compile jury pools and to select final juries could be improved to help achieve more inclusive juries. This chapter’s two sections—“Compiling Jury Pools” and “Jury Selection”—reflect the dual focus of the Task Force recommendations designed to improve the procedural mechanisms used at each stage of jury composition.

In the pages that follow, the implementation efforts illuminate the recognition by our justice system that the procedural status quo is no longer sufficient. The reader will note that although this recognition has motivated some action, much still needs to be done, particularly with regard to the jury experience (e.g., juror waiting periods, juror compensation and child care expenses). However, because the most important hurdle has been overcome (i.e., the recognition of the need for change), a continuum of the effort already underway will ensure that Oregon’s judicial system maintains its progress toward guaranteeing that all litigants in the Oregon courts are judged by juries of their peers. Success in this area is critical to the effective administration of justice because it is this goal that supports in large measure the overriding ambition of our justice system—fair and equal justice for all.

The Implementation Committee reviewed the recommendations with the Chief Justice, the State Court Administrator, several trial court administrators, legislators and the Oregon State Bar. It also reviewed the Multnomah Bar Association’s 1993 Jury Pool Report and other relevant literature on juries to help it develop various implementation proposals.

# COMPLYING JURY POOLS

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This section describes the efforts to ensure that the pool from which jurors are selected is representative of the community served. In other words, it concerns an issue the Task Force described as one of “getting minority jurors to the courthouse.” The next section, “Jury Selection,” records the efforts to ensure that minorities, once in the pool of prospective jurors, are selected and retained on juries.

The jury pool issue has three parts—the jury source master list, the summons process and the juror’s experience—all of which affect the representativeness of jury pools. Based on its analysis of the current jury pool compiling process and discussions with the Chief Justice, the State Court Administrator and several trial court administrators, the Implementation Committee concluded that efforts to improve the juror experience and the jury summons process were most important and would accordingly have the most significant effect on the inclusivity of juries.

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## THE JURY MASTER SOURCE LIST

**The Master Source List.** Jury selection begins with the source list. Once a year, the State Court Administrator (SCA) compiles a master source list. To create the master list, the SCA merges a list of registered voters and a list of Department of Motor Vehicles (DMV) driver’s license and state identification and handicap card holders and sorts the combined list to remove duplicate names and ineligible persons. The SCA sorts the master list by county and then randomly sorts the individuals on the list, assigning a number to each person that designates her place in “line.” The SCA provides the master source list to counties. The counties then conduct their own random selection routine to create a jury pool.

**Task Force Recommendations 7-1 and 7-2.** The Task Force concluded that, based on national research and a 1993 study conducted by the Multnomah Bar Association, “the failure of juries to represent their communities is largely a function of the selection process.” The Task Force accordingly made two recommendations designed to increase the number of people on the source list by expanding the lists from which potential jurors are drawn.

**The Implementation Status.** The Implementation Committee (IC) met with the Chief Justice and the SCA to review recommendations 7-1 and 7-2. The IC’s subcommittee on juries also independently analyzed the relationship of the jury source list to the representativeness issue to determine whether it should develop legislation to expand the source list. The IC concluded that although not perfect, the merged voter registration and DMV driver’s license and state identification and handicap card holders list was, as described by one commentator, “quite inclusive.” The IC found that the number of persons captured by the source list nearly matched, and in some cases exceeded, the numbers present in the general population.

Based on the discussions and analysis, the IC, the Chief Justice and the SCA agreed that the lack of minority representation on juries was not a source list issue, but rather was related to the summons process and jury experience. Consequently, the IC decided not to pursue legislation in this area or request that the Chief Justice make changes to the source list that were permissible under current law. The IC’s conclusion in no way suggested that jury representativeness was not a problem. It simply concluded that the most effective way to address the lack of minority representation on

juries was to dedicate resources to improving the summons process and jury experience. The efforts in these two areas are described below.

**Related Task Force recommendations: R 7-1 and 7-2**

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## THE JURY SUMMONS PROCESS—CREATING AN ATMOSPHERE OF COMPLIANCE

**The Summons Process.** Oregon's jury summons and selection process is governed by ORS 10.225 to 10.265. The excuse and deferral rules are set forth at ORS 10.050 and ORS 10.055 respectively. The related penalties for failure to respond to a subpoena are prescribed at ORS 10.990. The summons process begins after a county identifies its list of potential jurors from the SCA's master source list. The county's smaller list is called a term jury list. ORS 10.255(5) requires that not less than ten days prior to the beginning of a jury service term the court clerk "summon the persons . . . on the term jury list" by sending them a subpoena for service. A juror's service term is usually ten days but may be as long as two months (see ORS 10.105).

Once subpoenaed, a potential juror must complete her service unless she can obtain an excuse or a deferral. ORS 10.050 requires a judge or clerk to excuse a person from jury service if the person can show "undue hardship or extreme inconvenience" and ORS 10.055 authorizes a court to defer a person's service, for good cause, to a later jury term within one year. ORS 10.050 allows courts to accept and grant requests for an excuse over the phone or through the mail. Some courts have limited phone requests to deferrals.

If a person subpoenaed for jury service fails to respond or attend as required, ORS 10.990 mandates that a judge order the person to appear and explain why she failed to respond or attend. If the person then fails to appear as required by the order, or appears and fails to provide an adequate explanation, the judge may punish the person for contempt.

**The Problem: An Atmosphere of Leniency.** The problem, simply put, is that Oregon courts have created an atmosphere of noncompliance or leniency regarding jury service. In its final report, the Task Force concluded that the courts excuse "[j]urors . . . too readily . . . for reasons that are not legitimate," and that "some of those sent subpoenas do not respond at all." Empirical data gathered by the Multnomah Bar Association (MBA) Jury Pool Selection Subcommittee for its 1993 Jury Pool Report corroborates these conclusions. For example, in 1992, 57 percent of those subpoenaed for jury service in Multnomah County requested and received an excuse or deferral and 13 percent failed to respond at all. In Washington County, the 1993 figures are similar (60 and 10 percent). In each example, the combined percentages show that over half of those persons originally subpoenaed for jury service are, on average, eliminated from the jury pool even before they get to the courthouse. As highlighted by the Task Force, only a small percentage of those summoned actually appeared for service.

Because Oregon's master list is inclusive yet juries remain unrepresentative, such hemorrhaging contributes in a direct way to the lack of community representation on juries. Consequently, courts need to heighten the care with which they administer the summons process. In so doing, the courts will create an atmosphere of compliance regarding jury service and cause the public to seek excuses and deferrals only when absolutely necessary. And the overall quality of juries will improve!

**Task Force Recommendations 7-5 and 7-6.** The Task Force recommended two improvements to the summons process by encouraging the development of guidelines for stricter enforcement of excuse and deferral rules (making excuses the exception, not the rule) and the implementation of a follow-up procedure to contact jurors who do not respond to the subpoena.

**The Implementation Status.** The Implementation Committee (IC) met with the Chief Justice and the State Court Administrator to review the summons process and recommendations 7-5 and 7-6 and reviewed the MBA's 1993 Jury Pool Report and other relevant literature. The IC learned that the Chief Justice and the SCA agreed with recommendations 7-5 and 7-6 but considered improvements to the juror experience as the highest priority. The SCA noted that although she reviewed the Task Force Report with all trial court administrators and received broad support for an improved summons process, the improvements called for by recommendations 7-5 and 7-6 would require significant additional resources (money and people). Recognizing the lack of available resources, the SCA concluded that funding and staff time should go first to improving the juror experience because it is her opinion that increased juror compensation, child care expenses and shortened jury terms would do more to improve the representativeness of juries than a stricter summons process.

- **Implementation Committee Proposal 6.1.** The IC agreed with the SCA's conclusion. Notwithstanding, the IC proposes an inexpensive improvement to the summons process: send the public a message of compliance regarding jury service. An example of a comparatively inexpensive and effective juror summons process that operates from a perspective of compliance is that used by Clackamas County. It limits all phone requests to deferrals and encourages court staff to dissuade potential jurors from seeking excuses. According to the MBAs 1993 Jury Pool Report, Clackamas County's excuse and deferral rate was 44 percent. A percentage that is still too high, but lower than many other counties.

In contrast, Multnomah County's excuse and deferral rate was 57 percent. Its clerks reported at page 4 in the MBA's 1993 Jury Pool Report that "they [were] not forcing people to serve." Further, although Multnomah County court requires documentary support for most excuses (e.g., medical) and discourages the granting of excuses over the telephone, the court has authorized clerks to grant such requests by phone. The IC recognizes that this policy may be necessary due to the large volume of jurors processed by Multnomah County. However, when the policy is viewed in light of the 57 percent excuse and deferral rate, the conclusion is inescapable that it creates an atmosphere of noncompliance regarding jury service and thereby contributes to the higher excuse and deferral rates.

Research in jurisdictions with strict excuse and deferral policies and follow-up procedures showed that these jurisdictions compiled jury pools closely resembling the number and characteristics of persons on their master source lists. The IC believes Oregon courts can inexpensively

achieve a similar result by changing the message sent to the public. The elimination of excuses and deferrals from the jury pool process, within prevailing financial and other resource constraints, will help ensure that more minorities at least make it to the courthouse.

**Related Task Force recommendations: R 7-5 and 7-6**

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## THE JURY EXPERIENCE—JURY SERVICE SHOULD BE EASIER AND MORE REWARDING

- Length of Jury Service
- Juror Compensation

The jury experience is an important issue relating to jury representativeness because it has the potential to affect the interest level of people within the community in serving on juries. If the experience is known to be boring, disruptive and economically unrewarding, people will attempt to avoid serving. In Oregon's trial system, many potential jurors avoid jury service by requesting excuses and deferrals or not responding to a subpoena at all. For example, the MBA 1993 Jury Pool Report found that in Multnomah County only 13 percent of those summoned for service actually appeared. The report also found that of those appearing for service, many were dissatisfied. These persons most often claimed boredom as the reason for their dissatisfaction. The high percentages of persons seeking excuses for untenable reasons and not responding to a subpoena at all likely is related to the jury experience because, as the Task Force wrote, the unsatisfying jury experience is "no doubt communicated to other potential jurors in the community."

To improve the jury experience, and build upon the research done by the Multnomah Bar Association, the Task Force identified two aspects of jury service that needed attention: (1) juror compensation (including child care expenses); and (2) the use of a juror's time while waiting for trial. The Task Force also recommended communicating to the public the importance of jury service as a means to motivate service. To this end, it recommended that the juror orientation include such a message and that a related public relations campaign be implemented.

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### LENGTH OF JURY SERVICE

ORS 10.105 limits jury service terms to ten days or those necessary to complete a trial; however, a subpoena for jury duty does not guarantee that the person will serve in a trial. A person may complete her term of service in the jury pool room awaiting trial or might appear for service, be assigned to a short trial and complete her term on the same day. Although the shorter terms are possible and at times do occur, it is the long waiting periods that contribute to juror dissatisfaction. The MBA 1993 Jury Pool Report accordingly concluded that "a large portion of juror dissatisfaction [could] be attributed to the current service term."

**Task Force Recommendation 7-3.** In an effort to shorten jury terms, the Task Force recommended that the Chief Justice, the State Court Administrator, presiding judges and trial court administrators implement the one-trial/one-day system wherever practicable.

- **One-trial/One-day Jury Service.** The one-trial/one-day system describes a practice in which a juror reports for a jury service term of one trial or one day. In other words, if a potential juror appears and is selected for trial that day, she must complete the trial to satisfy her service duty; however, if she is not selected for trial that day, at the day's end she has satisfied her jury service obligation. The one-trial/one-day practice lessens the burden and boredom associated with jury service because the most a person will have to wait for trial is a single day. The lowered burden translates into a more satisfying experience for the potential juror. And an improved jury experience will result in fewer excuses and absences.

**The Implementation Status.** Marion and Multnomah County courts are planning to change their jury service process to the one-trial/one-day system. Marion County is developing an implementation strategy and hopes to begin operating the new system in the early part of 1996. Multnomah County implemented a one-trial/one-day system in October of 1995. Further, the State Court Administrator encourages all courts similarly to implement a one-trial/one-day system and will assist any court that wishes to do so.

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#### JUROR COMPENSATION

ORS 10.060 sets the compensation amount for jurors at \$10.00 per day served. In addition, ORS 10.065 provides jurors \$.08 per mile for travel to and from the courthouse. ORS 10.060(2) also authorizes counties to pay more than \$10.00 per day and the \$.08 mileage reimbursement; however, few counties can afford to pay higher amounts. Although designed not to replace working income, but rather to cover out of pocket expenses attributable to jury service, the compensation provided jurors hardly meets such needs. Moreover, as noted at page 30 of the MBA 1993 Jury Pool Report, "the compensation for jurors has changed very little over the last 40 years." Consequently, the Task Force concluded that this level of juror compensation was inadequate given inflation and increased travel, parking and child care needs.

**Task Force Recommendation 7-4.** The Task recommended that ORS 10.060 be amended to increase juror compensation. The Task Force suggested that the increase be combined with other procedural changes (e.g., the one-trial/one-day practice) to use jurors more efficiently and thereby minimize the total cost of an increase in juror compensation.

**The Implementation Status.** In the 1995 legislative session, the State Court Administrator (SCA) drafted and pursued the passage of Senate Bill (SB) 189. SB 189 would have increased juror compensation to \$20.00 per hour, established a minimum \$.10 per mile travel reimbursement and mandated the payment of parking fees and child and dependent care expenses. The SCA estimated that the increases would have required an additional \$2.5 million in the 1995-97 biennium. The Senate Judiciary Committee provided the bill a public hearing and work session. The Committee approved an amended bill with a "do pass" recommendation and subsequently referred it the Joint Ways and Means Committee due to the associated fiscal impact. However, SB 189 died in Ways and Means.

- **Implementation Committee Proposal 6.2.** Based on discussions with several trial court administrators and the SCA and an independent review of relevant literature, the IC concludes that an

increase in juror compensation and the provision of child and dependent care expenses is an important step toward addressing the jury representativeness issue. Accordingly, the IC proposes that interested parties should work with the SCA to continue to pursue legislative amendments to ORS 10.060 to increase juror compensation and provide for child and dependent care expenses. The IC commends the SCA's ongoing commitment to this end.

**Related Task Force recommendations: R 7-3 and 7-4**

## A PUBLIC EDUCATION EFFORT REGARDING JURY SERVICE— MOTIVATING SERVICE

The Task Force concluded that not only were many jurors dissatisfied with jury service but also that the public possessed a negative attitude toward jury duty. As noted above, the Task Force found that long service terms, inefficient use of jurors and inadequate compensation for jury service (including a failure to pay for child and dependent care expenses) contributed to the negative attitudes. The Task Force developed recommendations to address these concerns and, as the above sections illustrate, changes are being made. However, to get the message of change to the public, as well as the general message regarding the importance jury service, a public education effort is needed.

**Recommendation 7-7.** The Task Force accordingly recommended that the Oregon State Bar, in cooperation with the Office of the State Court Administrator, lead an intensive public relations campaign regarding the importance of jury service, the logistical concerns associated with serving as a juror and the fact that employers may not retaliate against an employee who takes time off to serve on a jury.

**The Implementation Status.** In January 1995, the Oregon State Bar Board of Governors asked the bar's Public Service & Information (PS&I) Committee to develop an implementation plan for a state-wide public education campaign regarding the importance of, and administrative concerns associated with, jury service. In February 1995, the PS&I Committee developed a preliminary plan. The core of the PS&I Committee's public education campaign strategy would be to distribute more widely the bar's "Handbook for Jurors." The PS&I Committee suggested that the booklet be distributed at Department of Motor Vehicles offices and by other resource groups. The Committee noted that wider distribution would require additional resources and was awaiting a funding decision.

- **Implementation Committee Proposal 6.3—A Short Public Service Announcement for Radio.** The Implementation Committee (IC) commends the PS&I Committee's efforts and encourages the allocation of sufficient funds to implement the distribution strategy. Additionally, the IC proposes that the SCA work with the PS&I Committee to develop a short public service announcement for public broadcasting and local radio stations, including minority-focused stations. The IC believes such an effort effectively will disseminate jury service information to minorities because broadcasted information would reach a large audience and the method of communication would merge with an ongoing activity (i.e., listening to the radio), rather than require an additional task (i.e., reading a booklet).

The IC also encourages Multnomah and Marion counties, because they are implementing one-trial/one-day jury term practices, to implement recommendation H of the MBA 1993 Jury Pool Report. Recommendation H suggests that Multnomah County hold a press conference regarding changes made to the jury service process, prepare a brochure explaining the changes for inclusion in the Voters' Pamphlet and mail the brochure to all large employers.

**Related Task Force recommendation: 7-7**

## IMPLEMENTATION PROGRESS "AT A GLANCE"

Rec. #	Description	Implementation Status
7-1	Pursuant to ORS 10.215(1), the Chief Justice should increase the number of minorities on the source list and implement changes permissible under existing law.	<ul style="list-style-type: none"> <li>• IC discussed with the Chief Justice and the SCA, independently reviewed the source list issue and determined that implementation was not necessary because the lack of minority representation on juries more directly related to the summons process and juror experience.</li> </ul>
7-2	The 1995 Legislative Assembly should consider legislation to change the method of selecting persons to be included in the "source list" for possible jury service in order to include more minorities in the jury pool.	<ul style="list-style-type: none"> <li>• See R 7-1 above.</li> </ul>
7-3	The Chief Justice, presiding judges, State Court Administrator and trial court administrators should shorten jury terms and implement one-trial/one-day practices wherever practicable.	<ul style="list-style-type: none"> <li>• Multnomah and Marion County Courts will implement one-trial/one-day practices in October 1995 and early 1996 respectively.</li> <li>• SCA encourages all trial courts to implement similar system and will provide assistance.</li> </ul>
7-4	ORS 10.060 should be amended to increase juror compensation.	<ul style="list-style-type: none"> <li>• SB 189 (not enacted).</li> </ul>
7-5	The Judicial Department should promulgate guidelines for stricter enforcement of excuse and deferral rules. Excuses should be the exception not the rule and if granted, service should be deferred rather than excused altogether.	<ul style="list-style-type: none"> <li>• The IC reviewed the summons process and recommended improvements with the Chief Justice and the SCA and concluded that while a stricter process is necessary, improvements to the juror experience took priority.</li> <li>• The IC also proposed that trial courts inexpensively tighten the summons process by sending the public a message of compliance.</li> </ul>
7-6	The State Court Administrator or trial court administrators should implement a follow-up procedure to contact jurors who do not respond to the subpoena.	<ul style="list-style-type: none"> <li>• See R 7-5 above.</li> </ul>
7-7	The Oregon State Bar, in cooperation with the State Court Administrator, should lead an intensive public relations and education effort regarding the importance of jury service.	<ul style="list-style-type: none"> <li>• In February 1995, the OSB's Public Service &amp; Information Committee developed an implementation strategy that emphasized wider distribution of its "Handbook for Jurors."</li> <li>• The IC proposes the development of a short public service announcement for radio and that Marion and Multnomah counties implement recommendation H of the MBA 1993 Jury Pool Report.</li> </ul>

# JURY SELECTION

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This section addresses the other half of the effort to compose unbiased and representative juries: jury selection. The Task Force found that despite the goal of the jury pool and selection process, it does not always produce ideal juries. In some cases biased individuals find their way to final juries and in others, lawyers improperly remove potential jurors solely on account of race. The Task Force accordingly recommended five procedural improvements to the process designed to help identify and remove potentially biased jurors and to limit the improper removal of jurors. The recommendations and related implementation efforts are described below.

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## THE JUROR'S DUTY TO DISCLOSE BIAS

- **Juror Orientation**
- **Voir Dire**

It is axiomatic to note that potential jurors must honestly and completely respond to questions during jury selection in order for the lawyers to be able to identify and remove biased jurors. But more subtle than that is the duty of potential jurors to disclose racial bias. If bias exists on a subconscious level, it may go unnoticed by not only the lawyer, but even the juror herself. Consequently, courts need specifically to remind potential jurors of their disclosure obligation. Also, as overseers of the trial process, judges have an obligation to be on guard for potentially biased jurors in case attorneys fail to identify the biased person. The Task Force made two recommendations designed to communicate specifically the importance and obligation of jurors to disclose racial bias during jury selection and one that highlighted the judge's important oversight role.

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### JUROR ORIENTATION

When potential jurors arrive at the courthouse to begin their jury service term, they are directed to the jury pool waiting room. Although the specific components vary among counties, all courts provide potential jurors a jury service orientation at this time. The orientation is designed to inform potential jurors what jury service will be like and what the court expects of them. For many of the persons, jury service is their first experience with the court system. Consequently, the time presents a unique opportunity to acquaint potential jurors with their duty to disclose racial bias during jury selection, to the importance of their role as the triers of fact and to the necessity that they serve in an unbiased manner.

**Task Force Recommendation 7-8.** The Task Force recognized the unique opportunity jury service orientation presented and accordingly recommended that all potential jurors receive an orientation that included a statement on why it is essential to disclose personal biases based on race.

**The Implementation Status.** Jury service orientation usually involves three parts: (1) a brief orientation by a court staff person; (2) the Oregon State Bar's "Handbook for Jurors"; and (3) the State Court Administrator's juror orientation video presentation. In Multnomah County, Judge Robert P. Jones also speaks to the potential jurors about the importance of jury service in the judicial system. Below, the IC describes the three processes and makes a related proposal.

- **Oral Orientation.** The oral orientation provides potential jurors an overview of the logistical concerns related to jury service. For example, information ranging from when to call-in to where to park is included. This orientation generally does not include a statement on the importance of disclosing racial bias.
- **The Oregon State Bar's "Handbook for Jurors."** The Oregon State Bar provides the booklet to all courthouses. The courthouses make it available to all potential jurors. The 15-page booklet is written at a thirteenth-grade reading level and describes the importance and experience of, and some of the laws and processes related to, jury service. It contains no explicit statement regarding the need to disclose racial bias.
- **The State Court Administrator's Juror Orientation Videotape.** In 1988, the Office of the State Court Administrator produced the videotape for courts to use to orient prospective jurors. The tape is 18 minutes long, opens with a statement by Oregon Supreme Court Chief Justice Wallace P. Carson, Jr. and describes the jury process. The tapes discusses the importance of jury service but does not contain a succinct statement regarding the necessity of disclosing racial bias. It is close-captioned for the hearing impaired.

**Implementation Committee Proposal 6.4 and 6.5.** After a review of the orientation processes, the Implementation Committee (IC) concluded that the oral orientation was effective and well suited to its purpose: logistical information. The IC also found that although the bar's "Handbook for Jurors" contained important information regarding jury service and provided a useful information resource for potential jurors, it lacked a specific reference to a juror's duty to disclose racial bias and was written at a very high reading level—thirteenth grade. The IC concluded that the high reading level likely limited the effective dissemination of the booklet's information and contributed to, as noted by the MBA 1993 Jury Pool Report at page 28, "jurors glanc[ing] at the pamphlet disinterestedly." Finally, the IC concluded that the videotape was an excellent overview of the jury process, its importance and what the juror can expect. The IC commends the fact that it is close-captioned. However, the IC also concluded that the videotape insufficiently informed potential jurors about the importance of disclosing racial bias. The IC proposes the following action regarding the three items:

- **Oral Orientation.** No changes needed.
- **"Handbook for Jurors" (IC Proposal 6.4).** The IC proposes that the bar's Public Service & Information Committee rewrite the booklet at an eighth-grade reading level and include in the revised version a small section on a juror's duty to disclose racial bias. The IC also recommends that the revised version contain a section in the beginning that highlights the most important aspects of jury service—e.g., duty to disclose bias, duty to try cases impartially and employment protection. Further, the rewrite should discuss the one-trial/one-day system being implemented in Multnomah and Marion Counties because many persons are summoned for jury duty in these two counties and thus would find the information relevant.
- **The SCA's Video Orientation—Postpone Update (IC Proposal 6.4).** The IC proposes that the SCA update the tape to include a specific statement on a juror's duty to disclose racial bias when the current Chief Justice retires, so the tape's introduction will need to be redone. The

statement could be a part of the Chief Justice's opening remarks. The IC proposes that changes to the videotape be postponed because the current tape is very well done, producing a new videotape or splicing an additional segment into the current one would incur significant costs and a different communication mechanism could be used to inform potential jurors on the importance of disclosing bias during voir dire: the juror oath. Consequently, in lieu of producing a new tape, or splicing into the current one, the IC recommends that the juror oath on voir dire include a statement regarding the necessity and importance of disclosing any racial bias during questioning. This proposal will be discussed more fully in the next section.

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## VOIR DIRE

An important part of jury selection is the voir dire process. Voir dire describes the process of selecting the jurors who will actually hear the case. The process involves a group of randomly selected potential jurors from the jury pool called a jury panel. From this panel, twelve or six (depending on the type of case) jurors are chosen. During voir dire, lawyers and judges ask potential jurors questions to determine the appropriateness of their sitting on the jury. Prior to answering questions, the clerk administers an oath in which jurors swear to answer truthfully. The judge also has discretion throughout the process to question potential jurors regarding their ability to effectively serve as jurors. Once the questioning and removal process is complete, the remaining jurors compose the jury panel that will hear the case.

**Task Force Recommendations 7-9 and 7-10.** Because voir dire is but one step away from trial, it presents two unique opportunities to help prevent racially biased persons from serving on final juries: (1) the lawyers' procedural right to question and remove potential jurors; and (2) the judge's discretion to examine them independently. As noted above, in order for the question and removal process to work effectively, jurors must answer questions honestly and disclose personal bias. Accordingly, the Task Force recommended that the juror oath contain a succinct statement, in addition to the general duty to answer truthfully all questions, regarding the obligation to disclose racial bias during voir dire and the duty to try the case free of bias. The Task Force also recommended that trial court judges, in their discretion or at the request of a party, conduct an initial voir dire to determine if any of the potential jurors are racially biased. In this section, the report discusses these two recommendations. Two recommendations addressing the rules of procedure governing jury selection are discussed in the next section.

**The Implementation Status.** All trial courts administer an oath to potential jurors on voir dire; however, as noted by the Task Force, none includes a succinct statement regarding the duty to disclose racial bias. Further, the substance of the oath seems to be guided by custom rather than rule. Indeed, the Implementation Committee (IC) reviewed the relevant laws and administrative rules governing court procedure and found no discussion of the juror oath on voir dire. In fact, the IC found that only the *Oregon Judges Criminal Benchbook* (1987) at page 9-2 mentioned the oath. In contrast, Rule 57E of the Oregon Rules of Civil Procedure prescribes the timing and substance of the oath given to the final jury panel. The IC was troubled by the absence of any formal guidance regarding the juror oath on voir dire and accordingly concluded that a similar procedural rule

should be developed that governs the substance and timing of this oath. The content and location of the proposed rule is discussed below.

Regarding an independent voir dire by judges, the IC notes that judges presently have this authority. Further, the IC appreciates the need for this power to remain flexible and within the court's discretion. Accordingly, the IC supports the flexibility and discretion inherent in the current system and encourages judges to be on guard for potentially biased jurors and to exercise their authority to question independently these jurors to determine if they harbor any racial prejudice.

- **Implementation Committee Proposal 6.6.** The IC proposes that the Chief Justice order that the following rule be added to chapter six of the Uniform Trial Court Rules:

**Juror Oath on Voir Dire.** Prior to questioning by the court or counsel on voir dire, the court shall administer to the jury panel, or individually if necessary, an oath substantially similar to the following:

Do each of you solemnly swear or affirm that you will truly and fully answer all questions put to you by the court and counsel regarding your qualifications to act as jurors in this case and will disclose to the court or counsel any prejudices you may have against a particular party or racial, ethnic or religious group?

It is important to note that precedent exists for the regulation of the substance of other oaths. As noted above, ORCP 57 E regulates the oath given to the final jurors and UTCR 3.080 addresses the swearing-in of witnesses. ORS 9.250 governs the oath for new attorneys. ORS 1.300(7) prescribes the oath a senior judge must take and ORS 1.635(2) governs the oath to which a pro tempore judge must subscribe.

**Related Task Force recommendations: R 7-8, 7-9 and 7-10**

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## THE JURY SELECTION PROCESS—THE OREGON RULES OF CIVIL PROCEDURE

- **Senate Bill 868—Challenges for Cause**
- **Senate Bill 869—Peremptory Challenges**

During the voir dire process, lawyers can use two procedural tools to remove potential jurors from the panel who, in the lawyers' opinion, would be unable to try the case impartially: (1) a removal for cause; and (2) a peremptory challenge. When exercising a challenge for cause, the lawyer must state the reasons why she wishes to remove a potential juror from the panel. The judge then decides whether to grant the challenge. In contrast, the exercise of a peremptory challenge requires no explanation. The Task Force recommended an improvement to each process.

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### CHALLENGE FOR CAUSE

The Task Force heard testimony indicating that racial bias had played a decisive role in jury determinations and that jurors felt discouraged from reporting such bias to the court because they believed

nothing would be done. Further, the Task Force found that although Oregon law makes it difficult to determine whether bias played a role in jury deliberations, the law represented sound public policy. The Task Force also concluded, however, that the recent Oregon Supreme Court decision in *Erstgaard v. Beard*, 310 Or 486, 800 P2d 759 (1990) presented a more troubling dilemma. The court held that a juror's statements of bias during deliberations could not, without more evidence, be the basis for setting aside the resulting verdict. The decision in *Erstgaard* foreclosed any remedy for a jury decision tainted by evidence of racial bias. Consequently, the Task Force concluded that the lawyers should be able to use statements made by potential jurors suggesting racial prejudice to support that juror's removal from the jury panel. The Task Force concluded that such a tool would effectively limit biased persons from serving as jurors.

**Task Force Recommendation 7-11.** The Task Force accordingly recommended that the legislature amend ORCP 57 D to establish a specific, actual cause to challenge a juror based on any statement made by the prospective juror that showed prejudice on part of the juror based on race or ethnicity.

**The Implementation Status—Senate Bill 868.** The Implementation Committee (IC), the Oregon State Bar, the Department of Justice and the State Court Administrator jointly drafted Senate Bill (SB) 868 to implement recommendation 7-11 and accordingly amend ORCP 57 D. SB 868 establishes a specific, actual cause to challenge a juror based on any statement made by the prospective juror that shows prejudice based on race, ethnicity or sex. In so doing, it will prohibit racially biased jurors, and jurors harboring prejudice on the basis of sex, from serving on juries in the first place and thereby safeguard the deliberative process from being corrupted by racial or gender prejudice.

In April 1995, the Senate Judiciary provided the bill a public hearing and work session. The committee approved an amended bill—gender bias was added—and sent it to the Senate floor with a “do pass” recommendation. The Senate unanimously approved the bill. The House Judiciary Committee then provided the bill a public hearing and work session, ultimately approving the bill and sending it to the House floor with a “do pass” recommendation. The House also unanimously approved SB 868. On July 19, 1995, Governor John Kitzhaber signed the bill into law. The new law became effective on September 9, 1995.

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## PEREMPTORY CHALLENGES

At the Task Force hearings, many minorities testified that they perceived the judicial process as unfair because juries did not contain minority persons. The Task Force also received survey responses indicating a perception among those working in the judicial system that lawyers used the jury selection process to remove minorities from juries. The procedure used in jury selection most susceptible to abuse of this nature is the peremptory challenge because it allows lawyers to remove potential jurors without stating a reason for the removal. The Task Force stated that the use of peremptory challenges solely on the basis race or ethnicity should not be permitted. The Task Force concluded that safeguarding the peremptory challenge process from the influence of racial bias would ensure that juries are more diverse and that litigants are judged by a jury of their peers.

**Task Force Recommendation 7-12.** The Task Force accordingly recommended that the Judicial Department propose legislation designed to amend ORCP 57 to prohibit explicitly the use of peremptory challenges solely on the basis of race or ethnicity.

**The Implementation Status—Senate Bill 869.** The IC, the Oregon State Bar, the Oregon Department of Justice and the State Court Administrator jointly drafted Senate Bill (SB) 869 to implement recommendation 7-12. SB 869, which amended ORCP 57 D, establishes an orderly procedure for parties to question the opposition's use of a peremptory challenge to exclude a prospective juror solely on the basis of the juror's race, ethnicity or sex. SB 869 codifies the rationale of *Batson v. Kentucky*, 476 US 79 (1986), a United States Supreme Court case. In *Batson*, the court held that the Equal Protection Clause of the Fourteenth Amendment forbids a party from challenging prospective jurors solely on account of their race.

In April 1995, the Senate Judiciary provided the bill a public hearing and work session. In a manner similar to the treatment of SB 868, the committee and the Senate unanimously supported an amended SB 869 (amended to include gender bias). The House likewise supported the bill and on July 7, 1995, Governor John Kitzhaber signed the bill into law. The new law became effective on September 9, 1995.

**Related Task Force recommendations: R 7-11 and 7-12**

IMPLEMENTATION PROGRESS "AT A GLANCE"

Rec. #	Description	Implementation Status
7-8	Every potential juror should receive an orientation (perhaps by videotape) that not only describes the jury process, but that also includes a succinct statement regarding the necessity of revealing bias.	<ul style="list-style-type: none"> <li>• Courts generally use three orientation tools:                             <ul style="list-style-type: none"> <li>* SCA Juror Orientation videotape</li> <li>* Verbal orientation by court clerk</li> <li>* OSB's "Handbook for Jurors"</li> </ul> </li> <li>• The IC concluded that while the tools effectively communicated the importance and logistics of jury service, none specifically addressed the necessity of disclosing bias.</li> <li>• The IC proposed that the "Handbook for Jurors" should be rewritten at an eighth-grade reading level and should contain a statement on a juror's duty to disclose bias during voir dire.</li> <li>• The IC also proposed that the SCA postpone the addition of a similar statement to the video until the current Chief Justice retires and his introductory statement will need revision.</li> </ul>
7-9	The oath given to potential jurors should include a specific reference to the duty to disclose to the court, during the jury selection process, a juror's racial bias and the duty to decide the case free of bias.	<ul style="list-style-type: none"> <li>• The IC proposed a rule governing the substance of the juror oath on voir dire be added to chapter six of the Uniform Trial Court Rules.</li> </ul>
7-10	Prior to voir dire, when requested by a party or in the court's discretion, a judge should conduct an initial voir dire of potential jurors to determine if any of the potential jurors are racially biased.	<ul style="list-style-type: none"> <li>• The IC supports the flexibility and discretion inherent in the current system and encourages judges to be aware of potentially biased jurors and exercise their authority to question them if necessary.</li> </ul>
7-11	The legislature should amend ORCP 57 D to establish a specific, actual cause to challenge a juror based on any statement made by the prospective juror that showed prejudice on part of the juror based on race or ethnicity.	<ul style="list-style-type: none"> <li>• Senate Bill 868 (signed by the Governor on July 19, 1995 and became effective on September 9, 1995).</li> </ul>
7-12	The Judicial Department should propose legislation designed to amend ORCP 57 to prohibit explicitly the use of peremptory challenges solely on the basis of race or ethnicity.	<ul style="list-style-type: none"> <li>• Senate Bill 869 (signed by the Governor on July 17, 1995 and became effective on September 9, 1995).</li> </ul>